No. 90-1 33

In The

Supreme Court of the United States

October Term, 1990

BERNARD A. SCHWARTZ, *et al.*, and THE BOARD OF COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,

Petitioners,

vs.

ROBERT E. HARRISON, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

Does the opinion of this Honorable Court in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), interpreting the Commerce Clause and Supremacy Clause of the Constitution of the United States in relation to the Federal Aviation Act of 1958, as amended, and the Noise Control Act of 1972, as amended, prohibit a local government, through its zoning board, in the exercise of its police powers reserved under the Tenth Amendment to the Constitution of the United States, from imposing conditions relating to the frequency of flights and hours of operation in the granting of a request for a conditional use to establish a small, rural grass airstrip?

LIST OF PARTIES

Petitioners:

1. Bernard A. Schwartz, Catherine A. Rauschenburg, Robert L. Harrison, David Pickett, Jennifer Leaf and others are adjoining, confronting and nearby property owners of the airstrip.

2. The Board of County Commissioners of Carroll County consists of the following persons elected by the registered voters of Carroll County: John L. Armacost, Julia W. Gouge, J. Jeffrey Griffith. The individual commissioners are not parties to this proceeding.

Respondents:

Robert E. Harrison is the owner of property on which the airstrip is located.

Jerry Gaudet is the owner and operator of "Bay Soaring," the user of the airstrip.

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Petitioners, Bernard A. Schwartz, Catherine A. Rauschenberg, Robert L. Harrison, David Pickett, Jennifer Leaf and the Board of County Commissioners of Carroll County respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the State of Maryland entered in this proceeding on April 19, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (Appendix A, 1a-21a) is published as *Harrison, et al. v. Schwartz, et al.*, 319 Md. 360, 572 A.2d 528 (1990). The opinion of the Court of Special Appeals of Maryland (Appendix B, 22a-30a) is unpublished. The decision of the Circuit Court for Carroll County, Maryland (Appendix C, 31a-37a) is unpublished.

STATEMENT OF JURISDICTION

The Court of Appeals of Maryland entered its opinion on April 19, 1990 (1a-21a). This Honorable Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 8, Clause 3 (Commerce Clause):

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes; . . .

United States Constitution, Article VI, Clause 2 (Supremacy Clause):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in

> every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment X (Reserved Powers):

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.*, and § 1432 (Appendix D, 38a-53a);

Noise Control Act of 1972, 49 U.S.C. § 1431 (Appendix D, 53a-59a);

Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. § 2101, *et seq.* (Appendix D, 58a);

Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2201, *et seq.* (Appendix D, 60a-67a).

STATEMENT OF THE CASE

On March 16, 1983, Robert E. Harrison and Jerry Gaudet (hereinafter sometimes called "Bay Soaring") filed an application for hearing with the Carroll County Board of Zoning Appeals (hereinafter called "Board") for a conditional use permit to conform with a prior (December 20, 1982) decision of the Board (Case No. 1879). The Board of Zoning Appeals conducted hearings in Case 1988 on February 21-24, 1984, and March 15, 1984, and granted a new conditional use permit subject to eight (8) conditions in a decision dated May 11, 1984. These conditions included the following:

> 2. Aircraft take-offs shall be separated by intervals of at least 15 minutes in order to minimize the adverse effects of aircraft engine noise upon the residents of the surrounding area and to reduce the intensification of the use of the property in what is otherwise a primarily rural residential area.
>
> 3. Aircraft take-offs shall not be made before 9:00 a.m. or later than 7:00 p.m. on any day.
>
> 7. The Applicant will design take-off and landing patterns in such a way that they will minimize the adverse effect upon neighboring residents. In addition, the Applicant shall require people taking off and landing from the airfield to be familiar with the landing and take-off patterns and to use them.

On June 4, 1984, the appellants, Robert E. Harrison and Jerry Gaudet, filed a petition for appeal from this decision in the Circuit Court for Carroll County, Maryland, designated therein as Law No. 26499. After a related appellate decision (*County Commissioners of Carroll County v. Gaudet,* No. 1270, September Term 1986, Unreported (C.S.A. Md. June 23, 1987)) remanded the case, the Circuit Court for Carroll County issued an opinion and order, dated August 23, 1988, which found invalid the above-noted Conditions 2, 3 and 7 imposed by the Board in Case 1988 based upon the decision of this Honorable Court in *City of Burbank v. Lockheed Air Terminals, Inc.*, 411 U.S. 624 (1973). It was at this stage of the proceedings below that the issue of federal preemption was first raised. This decision was appealed to the Court of Special Appeals of Maryland by Bernard A. Schwartz (and other adjoining, confronting and nearby neighbors) and the Board of County Commissioners of Carroll County.

The Court of Special Appeals in *Schwartz, et al, v. Harrison, et al.*, No. 1425, September Term 1988 Unreported (C.S.A. Md., May 4, 1989) reversed the Circuit Court for Carroll County in holding that Conditions 2 and 3 imposed by the Board were not preempted by federal law and that the facts and circumstances surrounding the Woodbine airstrip were significantly distinguishable from those related to the Hollywood-Burbank commercial airport (22a-30a).

The Court of Appeals of Maryland granted a petition for writ of certiorari filed by the airstrip owner and operator, Bay Soaring, and heard argument on January 4, 1990. In an opinion, dated April 19, 1990, the Court of Appeals of Maryland held that Conditions 2 and 3 imposed by the Board were invalid because "[T]hey trespass upon a field that has been impliedly preempted by federal law." *Harrison, et al. v. Schwartz, et al.*, 319 Md. 360, 362, 572 A.2d 528, 529 (1990).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION BY ERRONEOUSLY APPLYING DECISIONS OF THIS HONORABLE COURT.

In 1973 this Honorable Court rendered a divided decision (5 to 4) in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), declaring invalid a municipal ordinance passed by the City of Burbank, California, which prohibited the take-off and landing of jet aircraft between the hours of 11:00 p.m. and 7:00 a.m. The Court of Appeals of Maryland relied upon this decision in holding that Condition 2 (relating to intervals between flights) and Condition 3 (relating to hours of operation) imposed by the Carroll County Board of Zoning Appeals in

granting a request to establish a rural, grass airstrip were impliedly preempted by federal law. It is respectfully submitted that the reliance of the Court of Appeals of Maryland on the Burbank case is misplaced and inappropriate.

There are enormous factual differences between the Hollywood-Burbank commercial jet airport and the rural Woodbine grass airstrip. In *Burbank*, the airport in question was a fully functioning public commercial facility handling commercial air carriers with cargo, passengers and related services engaged in interstate commerce. In the instant case, the airstrip is a grass field from which one or two privately owned planes tow gliders into the air. The aircraft in *Burbank* included large jets against which the stricken municipal ordinance was directed whereas only privately owned single-engine propeller planes and gliders use the grass landing area at Woodbine, Maryland. The affected flights in *Burbank* included interstate commercial traffic whereas the gliders at the Woodbine site are intended to be towed from and return for landing to a single grass landing area in Carroll County, Maryland. The Hollywood-Burbank public commercial airport services an urban area whereas the Woodbine airstrip is located in a predominantly rural area with ground access from a narrow dirt road and has no air traffic relationship with any other airstrip or airport. Although the Court of Appeals of Maryland correctly observed, "Obviously, the small Woodbine airport is very different from Hollywood-Burbank," the court nevertheless believed that the factual disparities were irrelevant in stating, "The Supreme Court did not make an exception for small airports that do not involve inter-airport commercial cargo or passenger flights, or for activities not expressly governed by federal statute or regulation." *Harrison v. Schwartz* at 368-369, 528 A.2d at 532. This expansive interpretation of *City of Burbank* was not contemplated or intended by this Honorable Court. Indeed it is difficult to comprehend this Honorable Court finding preemption

if the Woodbine airstrip facts been before the court in 1973 rather than *Burbank*.

In addition, the relevant federal statutory and regulatory framework for the Hollywood-Burbank commercial jet airport is wholly different from that applicable to the Woodbine grass airstrip. The Federal Aviation Administration (hereinafter sometimes called "FAA") had the authority and responsibility to issue an airport operating certificate for the Hollywood-Burbank commercial jet airport (*see* Federal Aviation Act, 49 U.S.C. § 1432) but the FAA has no authority or responsibility to issue any license for the operation of the Woodbine grass strip. At the Hollywood-Burbank airport, the FAA and other federal agencies have direct control and responsibility over the scheduling of flights and flight operations whereas at Woodbine only the operators of the airstrip exercise any real, practical operational control over take-offs, flight paths, landings and who may utilize the airstrip. respect to aviation noise, the Noise Control Act of 1972 was found applicable to (and has by further legislative action been made clearly binding on) the Hollywood-Burbank airport. However, federal airport noise legislation and regulations were not drafted in consideration of, or in reference to, rural airstrips like the Woodbine grass airstrip. (*See* Federal Aviation Act, 49 U.S.C. § 1431 and §§ 2101, *et seq.*)

Subsequent to the decision in *City of Burbank*, Congress has further clarified its intent with respect to the regulation of aviation noise by the passage of the "Aviation Safety and Noise Abatement Act of 1979" (49 U.S.C. §§ 2101, *et seq.*) and the "Airport and Airway Improvement Act of 1982" (49 U.S.C. §§ 2201, *et seq.*). These more recent federal statutes plainly manifest that the Woodbine grass strip is not expressly or implicitly regulated by the Federal Aviation Administration with respect to noise. The FAA itself has not sought complete authority over all aviation noise as noted by the First Circuit Court of Appeals in *DiPerri*

v. Federal Aviation Administration, 671 F.2d 54, 58 (1st Cir. 1982):

> The FAA itself has steadfastly maintained that the local proprietor has primary responsibility for the regulation of airport noise. In a 1976 Noise Abatement Policy Statement, the FAA and the Department of Transportation stated that
>
> "Airport proprietors are primarily responsible for planning and implementing action designed to reduce the effect of noise on residents of the surrounding area. Such actions include optimal site location, improvements in airport design, noise abatement ground procedures, land acquisition, and restrictions on airport use that do not unjustly discriminate against any user, impede the federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce.
>
> We have been urged to undertake — and have considered carefully and rejected — full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users, and governments."
>
> FAA and DOT Noise Abatement Policy Statement at 5, 18 (Nov. 18, 1976), quoted in *Greater Westchester v. City of Los Angeles*, 160 Cal. Rptr. at 743, 603 P.2d at 1340.

In the Senate Report on the 1979 Act, the conflict between citizen opposition to aircraft noise and the development and

expansion of airports is discussed in detail. S. Rep. No. 52, 96th Cong., 2nd Sess. (1980). It is noteworthy that in a section entitled "Land Use Compatibility" the Report states:

> State and local governments are directly and uniquely responsible for insuring that land use planning, zoning, and land development activities in areas surrounding airports are compatible with present and projected aircraft noise exposure in the area.
>
> Control of compatible land use around airports is a key tool in limiting the number of citizens exposed to unacceptable noise impacts, and should remain exclusively in the control of State and local governments. Occasionally, it is a power enjoyed by individual airport operators; some operators are municipal governments that can impose appropriate land use controls through zoning and other authority. But even where municipal governments themselves are operators, the noise impacts of their airports often occur in areas outside their jurisdiction. 1980 U.S. Code Cong. & Admin. News, p. 89, 91.

There is nothing in the 1979 Act which expressly prohibits or limits a state and local government from exercising its zoning powers by taking into consideration the impact of aircraft noise. The Federal Aviation Act, as amended, does not create a scheme of regulation which reaches facilities such as the Woodbine grass strip. By its own definitions (49 U.S.C. § 2101(1)) the 1979 Act limits the FAA "airport noise compatibility planning" to "public use airports" which are defined in 49 U.S.C. § 2202(a)(18) as follows:

> "Public use airport" means:
>
> (A) any public airport
>
> (B) any privately owned reliever airport; and
>
> (C) any privately owned airport which is determined by the Secretary to emplane annually 2,500 or more passengers and receive scheduled passenger service of aircraft, which is used or to be used for public services.

This limitation of the FAA over "Airport Noise Compatibility Planning" is restated in the applicable regulations (14 C.F.R., § 150.3, Subpart A, Part 150, Subchapter I-Airports):

> This part applies to the airport noise compatibility planning activities of the operators of "public use airports" including heliports, as that term is used in section 101(1) of the ASNA Act as amended (49 U.S.C. 2101) and as defined in Section 503(17) of the Airport and Airway Improvement Act of 1982 (49 U.S.C. 2202).

The Woodbine gliderport meets none of the federal criteria for a "public use airport." *It is not* "under the control of a public agency, the landing area of which is publicly owned (49 U.S.C. § 2202(a)(17)); *it is not* "an airport designated by the Secretary as having the function of relieving congestion at a commercial service airport and providing more general aviation access to the overall community." (49 U.S.C. § 2202(a)(10)); and *it is not an airport* "determined by the Secretary to emplane annually 2,500 or more passengers and receive scheduled passenger service of aircraft" (49 U.S.C. § 2202(a)(10) and (18)). The Woodbine gliderport is simply a small, rural, grass airstrip which is not

regulated to any significant degree by the Federal Aviation Administration.

The lack of regulation over the Woodbine gliderport by the FAA was acknowledged by Mr. Jerry Gaudet, the principal owner and operator of Bay Soaring, during cross examination before the Carroll County Board of Zoning Appeals on February 22, 1984:

> [Mr. Gaudet]
>
> Okay. The FAA doesn't really inspect the airport. The FAA grants air space conditions. That if the air space is available, it's not going to conflict with other traffic, or what have you, they will say, okay, this is a good area for an airport, or it's not. They don't really inspect the runway itself.
>
> Q Does the FAA set standards of any kind for airports and runways?
>
> A No, they do not . . . . [E.48].

The judicial doctrine of preemption does not mean that anytime the federal government enters an area of regulation that state and local governments lose their respective rights to protect the general welfare of their citizens. This Honorable Court has considered the relationship and boundary lines between federal and state regulations on numerous occasions. Cases in which this Honorable Court has found preemption lacking notwithstanding federal entry into a field of commerce include *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986) (state sales tax on aviation fuel upheld); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) (state formulas for depreciation practices and charges not subject to FCC regulation);

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) (county ordinance imposing requirements on blood plasma not preempted by federal regulations); and, *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238 (1984) (state statute authorizing punitive damages arising from operation of a nuclear facility not preempted by federal laws); *Governor of Maryland v. Exxon Corporation*, 279 Md. 410, 370 A.2d 1102 (1976), *affirmed*, 437 U.S. 117 (1978) (state statute requiring divestiture of service stations not preempted by federal laws).

In analyzing the applicability of preemption in the instant case merely because the federal government has asserted general jurisdiction over airspace and aeronautical matters does not mean that state and local governments can never take action which impact on these matters. *See e.g., Wardair Canada, Inc. v. Florida, supra; Ward v. State*, 280 Md. 485, 495-96, 374 A.2d 1118, 1123-24 (1977), *cert. denied*, 434 U.S. 1011; *Rocky Mountain Airways, Inc. v. County of Pitkin*, 674 F. Supp. 312 (D. Colorado, 1987). The Federal Aviation Act, as amended, and the Noise Control Act, as amended, do not contain express provisions prohibiting a local zoning authority from imposing conditions in granting an application for land use involving aircraft. The legislative history of the relevant federal statutes and the federal agency regulations evidence a respect for the role of state and local governments in airport regulation which belie a dominant federal interest or scheme of pervasive federal regulation. While pilots and flight instructors are licensed by the FAA, the standards for aircraft engines are set by the FAA and utilization of airspace is subject to FAA regulation, the FAA, with respect to the Woodbine grass strip, *does not* control take-off and landings, *does not* issue an operating license or certificate, *does not* inspect the facilities and does not require "airport noise compatibility planning."

In summary, there is no evidence of a comprehensive scheme

of federal regulation over the rural, grass airstrip proposed for Woodbine, Maryland which prohibits the Carroll County Board of Zoning Appeals from exercising its discretion in the discharge of its legitimate functions. The Court of Appeals of Maryland has broadened the scope of the *Burbank* decision and has erroneously concluded that the federal government has "occupied the field" when in fact rural, grass fields such as the proposed Woodbine airstrip are not covered by the responsible federal agencies and are not within the ambit of federal statutes.

II.

THE COURT OF APPEALS' HOLDING OF PREEMPTION CONFLICTS WITH DECISIONS OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT, FEDERAL DISTRICT COURTS AND DECISIONS OF OTHER STATE COURTS.

The decision of this Honorable Court in *Burbank v. Lockheed* did not quiet the storm or resolve the tension between the environmental and nuisance concerns of adjoining property owners and the aviation industry. There has been a multitude of litigation which has considered various aspects of the impact of aviation on adjacent property owners.

In a significant footnote to the majority opinion, Justice Douglas stated, in consideration of the legislative history of the Noise Control Act of 1972, "We do not consider here what limits, if any, apply to a municipality as a proprietor." *Supra* at 635, n. 14. After a thorough review of the legislative history (now Chief) Justice Rehnquist observed in the four vote minority opinion of *Burbank*:

> A local governing body that owns and operates an airport is certainly not, by the Court's

> opinion, prohibited from permanently closing down its facilities. A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility. Even though the local government's decision in each case were motivated entirely because of the noise associated with airports, I do not read the Court's opinion as indicating that such action would be prohibited by the Supremacy Clause merely because the Federal Government has undertaken the responsibility for some aspects of aircraft noise control.

Supra at 653.

Seizing upon this "proprietor" distinction the United States District Court for the Northern District of California upheld the City of Hayward's ordinance enacted two years after the *Burbank* decision which prohibited "all aircrafts which exceeded a noise level of 75 dBA from landing or taking off from the Hayward Air Terminal between the hours of 11:00 p.m. and 7:00 a.m." *National Aviation v. City of Hayward,* 418 F. Supp. 417, 418 (N.D. Cal. 1976). The Ninth Circuit of the United States Court of Appeals also focused on "footnote 14" in protecting from preemption attack night curfews, certain low aircraft approaches on weekends, helicopter flight training and a maximum single event noise exposure level of 100 decibels enacted for a city owned and operated airport. *Santa Monica Airport Association v. City of Santa Monica,* 659 F.2d 100 (9th Cir. 1981). The Second Circuit of the United States Court of Appeals upheld a temporary ban on the landing of the supersonic transport Concorde in a case where the federal government conceded it had not preempted the entire field of airport noise regulation. *British Airways Board v.*

Port Authority of New York, 558 F.2d 75 (2nd Cir. 1977). *See also, Air Transport Association v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975).

In the area of land use, courts throughout the country have sustained the power of state and local governments to prohibit or condition the use of land for aviation use. The Supreme Judicial Court of Massachusetts has held that the length of a runway can be restricted. *Building Inspector of Lancaster v. Sanderson*, 372 Mass. 157, 360 N.E.2d 1051 (1977). The Supreme Court of New Jersey upheld the right of the Borough of Hawthorne to amend its zoning ordinance forbidding the taking off or landing of airplanes or helicopters. *Garden State Farm, Inc. v. Bay*, 77 N.J. 439, 390 A.2d 1177 (1978). The Supreme Court of Alabama sustained a trial court's injunction prohibiting the operation of a helicopter which generated excessive, loud and annoying noise in *Wood v. City of Huntsville*, 384 So. 2d 1081 (Ala. 1980). The Second District Appellate Court of Illinois has held that an increase in the number of planes, an intensification of use, can be restricted. *Ford City Bank and Trust Company v. County of Kane*, 114 Ill. App. 3d 940, 449 N.E. 2d 577, 70 Ill. Dec. 448 (1983). The Commonwealth Court of Pennsylvania rejected a federal preemption argument in upholding conditions, including fire safety, placed on a conditional use permit for a private heliport in *Gateway Motels, Inc. v. Municipality of Monroeville*, 106 Pa. Commw. 42, 525 A.2d 478 (1987). The Second District Appellate Court of Illinois concluded "that the Federal Aviation Act does not preempt local power to decide whether to allow new private RLAs (Restricted Landing Areas) on the basis of potential noise problems." *Wright v. County of Winnebago*, 73 Ill. App. 3d 337, 391 N.E. 2d 772 (1979). The United States District Court for the District of Maryland declined to apply the federal preemption doctrine to void a Frederick County ordinance which placed restrictions on the operation of a private rural airport. *Faux-Burhans v. County Commissioners of Broderick County*, 674 F.

Supp. 1172 (D. Md. 1987), *affirmed,* 859 F.2d 149 (4th Cir. 1988), *cert. denied,* ____ U.S. ____, 109 S. Ct. 869 (1989).

The Federal Aviation Act and *Burbank* also did not insulate airport owners and operators from the legal consequences of offensive noise. The Supreme Court of California held that a private cause of action of nuisance for injuries sustained as a result of noise from a city-owned airport was not preempted by federal law in *Greater Westchester Home Owners Association, et al. v. City of Los Angeles,* 160 Cal. Rptr. 733, 603 P.2d 1329 (1979). *See also, Bieneman v. City of Chicago,* 864 F.2d 463 (7th Cir. 1988). This potential liability was extended to a private airport proprietor in *Krueger v. Mitchell,* 112 Wis. 2d 88, 332 N.W. 2d 733 (1983).

The United States District Court for Maryland recently dealt with the necessity for the balancing and sharing of responsibilities between levels of government when it shielded from "preemption attack" an ordinance passed by the County Commissioners of Frederick County, Maryland, which regulated private airports by requiring private owners to file an application for a special exception and meet certain requirements which included for each airstrip to two, restricting the type of aircraft, providing for clear zones, requiring a minimum property size and specifying setbacks from property lines. As noted by Judge Smalkin in *Faux-Burhans v. County Commissioners of Frederick County,* 674 F. Supp. 1172, 1174 (D. Md. 1987):

> In the instant case, plaintiff can point to no federal statute or regulation explicitly or implicitly preempting the broad areas of regulation, of the size, scope, and manner of operations at a private airport such as his . . . .
>
> And, just as certainly, no federal law gives a citizen

> the right to operate an airport free of local zoning control.

This decision was affirmed by the United States Court of Appeals for the Fourth Circuit in an unpublished per curiam opinion dated September 9, 1988 (*Amos D. Faux-Burhans v. Board of County Commissioners of Frederick County*, No. 88-3929, unreported (4th Cir. 1988)) and a writ of certioriari was denied by this Honorable Court on January 23, 1989.

The decision of the Court of Appeals of Maryland is in conflict with the *Faux-Burhans* decision of the United States District Court for the District of Maryland and the affirmance by the United States Court of Appeals for the Fourth Circuit. This conflict is even more direct insofar as the respective jurisdictions in the two cases are adjacent counties in North Central Maryland. The Court of Appeals endeavored to distinguish *Faux-Burhans* by asserting the factors involved therein did not seek to control noise directly but there is more similarity than difference between these cases. It is submitted this Honorable Court should further define the proper parameters and explain its decision in *City of Burbank* or litigation in Maryland's subdivisions will continue with divided precedent. In addition, insofar as *Faux-Burhans* conflicts with the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. City of Blue Ash*, 487 F. Supp. 135 (S.D. Ohio, W.D. 1978), *aff'd mem.*, 621 F.2d 227 (6th Cir. 1980), relied upon by the Court of Appeals of Maryland, this conflict should be resolved.

III.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT INTERFERES WITH THE LEGITIMATE FUNCTIONS OF STATE AND LOCAL GOVERNMENTS AND MEANS AN UNREGULATED RELATIONSHIP BETWEEN THE USE OF LAND AND THE USE OF THE SKIES.

There are fifty states and thousands of counties, municipalities and other local governmental units and agencies which have zoning and land use authority and functions. The logical extension of the decision of the Court of Appeals of Maryland in the instant case, is to leave those governmental entities (including 23 counties and 155 municipalities in Maryland) virtually powerless to control airport operations in any manner, regardless of airport size, character, relation to adjoining property or lack of any practical, effective regulation. There are literally thousands of small, mostly rural airstrips which would be wholly unregulated if the reasoning of the Court of Appeals is sanctioned and left undisturbed.

This Honorable Court and lower federal courts have long recognized the deference to be given the states and local governments in land use cases and have traditionally not interfered with state courts in cases involving land use policy. *Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926); *Kent Island Joint Venture v. Smith,* 452 F. Supp. 455 (D. Md. 1978); *Caleb Stowe Associates v. County of Albemarla,* 724 F.2d 1079 (4th Cir. 1984); *Browning Ferris v. Baltimore County,* 774 F.2d 77 (4th Cir. 1985); *Fralin and Waldron, Inc. v. City of Martinsville,* 493 F.2d 481 (4th Cir. 1974). The deference of the federal courts in land use cases is a recognition of the balance which must be struck in this particularly sensitive and local field. In *Village of Belle Terre v. Boraas,* 416 U.S. 1, 994 S. Ct. 1536, 1541 (1974) the importance of local land use planning and zoning control was noted:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.* * * It is ample to lay out zones where family values, youth values, and the blessing of quiet seclusion and clean air make the area a sanctuary for people.

The dissenting opinion of Justice Marshall also recognized the importance of local land use control:

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I, therefore, continue to adhere to the principle of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), that deference should be given to governmental judgments concerning proper land-use allocation.

416 U.S. at 13, 94 S. Ct. at 1543.

This Honorable Court has recently reaffirmed the reasoning which must be applied when the constitutional balance between the states and the federal governments is tested. Although involving the application of 42 U.S.C. § 1983 to the states and to state officials, the language of *Will v. Michigan Dept. of State Police*, ____ U.S. ____, 109 S. Ct. 2304, 2308-9 (1989), is instructive:

> In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of

> clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision . . . .

The Federal Aviation Act, as amended, has never contained a clear statement of intent to regulate all aspects of rural grass airstrips. The Noise Control Act of 1972, as amended, likewise does not contain an express intention to regulate airstrips like the Woodbine gliderport. There is a significant absence of federal regulation for these kinds of airstrips which therefore requires a proper balancing of federal, state and local authority. The reasoning of the Supreme Court of New Jersey in finding no preemption in a determination of heliport locations is relevant to the proper balancing involved, *Garden State Farms, Inc. v. Bay, supra,* 390 A.2d at 1180-81:

> The case at hand does not present a situation where preemption may be predicated upon a felt need for a monolithic system of regulation. While in some important aspects uniform regulation may be required, such as in the control and supervision of air space, cf. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 626-628, 93 S.Ct. 1854, 1856-1857, 36 L.Ed.2d 547, 550 (1973), that obvious need does not reach down to the level of the location of small, relatively isolated, privately owned helistops or heliports. Cf. *Cooley v. Bd. of Wardens of the Port of Phila., supra,* 53 U.S. (12 How.) at 320, 13 L.Ed. at 1005.

Had the Federal Aviation Administration adopted regulations which could conceivably be said to occupy the field upon which the Carroll County Zoning Board has tread, it is certain that this case would not have arisen. The Board clearly focused on its limits

of authority when it recognized that it was preempted from regulating flight safety. But the issue of preemption of aircraft noise was never presented to the Board despite the issue being a major component of the case before the Board and a factor upon which the Board's decision was required to be based. In fact, the FAA has done precious little to occupy, or much less effect, the field of noise regulation at airstrips similar to the Woodbine gliderport. The FAA does regulate, aircraft noise from the standpoint of aircraft engines (14 C.F.R. Part 36), but does not regulate the noise of a rural airstrip as it impacts on adjoining or neighboring property owners. There is regulation of specific aircraft engine noise but not the compounded effect of frequent aircraft for take-offs, landings and pattern approaches at a rural, grass airstrip. The FAA regulates this aspect of airport noise by imposing upon airport operators specific requirements for mapping, identification, and compatibility programs (14 C.F.R. Part 150), but, contrary to the opinion of the Court of Appeals of Maryland, Part 150 does not apply to airports like the one proposed off a dirt road in rural Woodbine, Maryland because it is not a "public use airport." (14 C.F.R. § 150E). Interestingly even for "public use" airports the FAA has recognized the role local government should play in land use compatibility analysis for those airports subject to Part 150 by recognizing that "the" responsibility for determining the acceptable and permissible land uses and the relationship between specific properties and specific noise contours rests with the local authorities." (14 C.F.R. Appendix A to Part 150, Table 1).

The authority of a local zoning body to impose conditions on the granting of a land use request is well established in Maryland and throughout the United States. *See Exxon Inc. v. City of Frederick,* 36 Md. App. 703, 375 A.2d 34 (1978); *Miller v. Kiwanis Club of Loch Raven, Inc.,* 29 Md. App. 285, 347 A.2d 572 (1975); *Skipjack Cove Marina, Inc. v. Board of County Commissioners of Cecil County,* 264 Md. 381, 287 A.2d 49 (1972). The distinction

between land use control and a police power noise regulation has been observed by noted authorities. Robert M. Anderson, in his treatise *American Law of Zoning*, 3rd, p. 586, notes: "The federal government has not so preempted regulation of the airways as to prohibit local restrictions." Similarly, in 5 Rathkopf, *The Law of Planning and Zoning*, § 60.01(2), pp. 60-3—60-5, the authors discuss preemption, stating:

> Municipal zoning has been recognized as filling a gap in regulations that is not covered by the regulations issued by the FAA or state aviation regulatory agencies, which do not generally concern themselves with typical zoning considerations, and neither federal nor state acts regulating aviation and establishing regulatory agencies have been held to preempt regulations adopted under zoning enabling acts.

It is the responsibility of a local government zoning boar to balance the often competing interests of adjacent and confronting property owners as the Carroll County Board of Zoning Appeals judiciously and properly endeavored to do in the instant case. The decision of the Court of Appeals of Maryland leaves to the federal government the balancing of these local interests when in fact the federal government, through the Federal Aviation Administration, makes no effort to balance the interests involved in this proceeding. If a local governmental body can prohibit totally the establishment of an airport or airstrip with the noise impact a valid consideration, then a local governmental body should be able to place conditions on the establishment of an airstrip absent clear federal preemption.

CONCLUSION

Congress did not expressly or implicitly legislate control over the factual situation presented herein; the Federal Aviation Administration has not promulgated any comprehensive scheme of regulation; there is no dominant or overriding federal interest involved and the scope of the decision of this Honorable Court in *City of Burbank v. Lockheed Air Terminal, Inc.* has been erroneously expanded.

WHEREFORE, for the reasons hereinabove set forth, the decision of the Court of Appeals of Maryland should be reversed with a finding that the conditions imposed by the Carroll County Board of Zoning Appeals in granting a conditional use request to establish a small rural airport are not preempted by federal law.

Respectfully submitted,

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WEINBERG AND GREEN
Attorneys for Petitioners

APPENDIX A — OPINION OF THE COURT OF APPEALS OF MARYLAND FILED APRIL 19, 1990

319 Md. 360, 572 A.2d 528 (1990)

IN THE COURT OF APPEALS OF MARYLAND

No. 89

September Term, 1989

ROBERT E. HARRISON ET AL.

v.

BERNARD A. SCHWARTZ ET AL.

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
*Chasanow,

JJ.

Opinion by Adkins, J.
McAuliffe, J., dissents.

Filed: April 19, 1990

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* Howard S. Chasanow, a Judge of the Seventh Judicial Circuit, was specially assigned to the Court of Appeals at the time the case was argued. He was sworn in as a Judge of the Court on 17 January 1990.

Appendix A

When the Carroll County Board of Zoning Appeals granted a conditional use for a privately owned airport in 1982, it attached to that grant several conditions. One of them limited the frequency of take-offs of glider-towing aircraft; another established a curfew for the operation of those aircraft. Both conditions were designed to reduce the effect of aircraft engine noise on residential properties near the airport. Both are invalid. They trespass upon a field that has been impliedly preempted by federal law. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973). A sketch of the pertinent facts before us places the preemption issue in context.

I.

In 1972 petitioner Robert E. Harrison (Harrison) obtained from the Board of Zoning Appeals for Carroll County (the Board) a conditional use permit to operate a "private airport site and drop zone for parachutists" on a portion of his farm located near Woodbine in Carroll County. The parachutists, who used a single aircraft, were members of a small skydiving club which engaged in that activity mostly on weekends during the warmer months. The conditional use was subject to a condition requiring the establishment of parking facilities and to continued approval by the State Aviation Commission.

As time passed the parachuting activity diminished. By the early 1980's, petitioner Jerry Gaudet was leasing the Woodbine airport and running petitioner Bay Soaring, a glider organization, which used the airport for glider operations. (We shall refer to petitioners collectively as "Bay Soaring".) The airport stayed open every day. The gliders ordinarily were towed aloft by aircraft; sometimes as many as 90 flights a day were generated. Bay Soaring solicited the public to take lessons and rides at Woodbine. The

facility had obtained from the State Aviation Administration an airport operating certificate designating the "Woodbine Glider Fort" to operate as a "Licensed Private/Commercial Airport."

Harrison's neighbors (respondents Bernard A. Schwartz and others, hereinafter collectively "the Neighbors") were not pleased. Their protests resulted in a 1982 hearing before the Board, after which the Board concluded that the use of the airport had expanded beyond the limits of the 1972 conditional use. Under protest, Bay Soaring applied for a new conditional use permit.[1]

Hearings were held on that application. The Neighbors opposed it, expressing concern about aircraft engine noise, among other things. The Board granted a new permit, but attached to it eight conditions. Two of them are the basis of the controversy in this case. They are:

> 2. Aircraft take-offs shall be separated by intervals of at least 15 minutes in order to minimize the adverse effects of aircraft engine noise upon the residents of the surrounding area and to reduce the intensification of the use of the property in what is otherwise a primarily rural residential area.
>
> 3. Aircraft take-offs shall not be made before 9:00 a.m. or later than 7:00 p.m. on any day.

A third condition imposed by the Board was:

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1. Bay Soaring also appealed from the Board's 1982 decision. That appeal was eventually disposed of adversely to Bay Soaring. It is not before us. *See County Comm'rs of Carroll County v. Gaudet*, No. 1270, Sept. Term, 1986 (filed 23 June 1987) (unreported).

> 7. [Bay Soaring] will design take-off and landing patterns in such a way that they will minimize the adverse effect upon the neighboring residents. In addition [Bay Soaring] shall require people taking-off and landing from the airfield to be familiar with the landing and take-off patterns and to use them.[2]

When Bay Soaring appealed, the Circuit Court for Carroll County found that "[i]n imposing the . . . Conditions, airport noise appears to have been the Board's paramount concern . . . ." It held that these three conditions were invalid because of federal preemption. It remanded to the Board for further proceedings. The Neighbors and Carroll County (the County) appealed to the Court of Special Appeals, which held that condition 7, dealing with the conduct of flight in navigable airspace, was preempted. But it thought conditions 2 and 3 were not preempted. At the behest of Bay Soaring, we issued a writ of certiorari. 317 Md. 440, 564 A.2d 784 (1989).

II.

The United States Constitution "and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States [are] the supreme Law of the Land." U.S. Const. art. VI, cl. 2. *See also* Md. Decl. of Rights, Art. 2. Because of this supremacy, valid federal legislation and regulations may preempt state or local laws or regulatory actions. When valid federal law actually conflicts with state law, the former preempts the latter.

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2. Condition 7 is not at issue in this appeal.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S. Ct. 615, 621, 78 L. Ed. 2d 443, 452 (1984). And "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." *Id.* We have recognized that "[i]f the federal law expressly states a preemptive intent, that intent will govern." *Becker v. Litty*, 318 Md. 76, 86, 566 A.2d 1101, 1106 (1989) (citing *Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 2375, 85 L. Ed. 2d 714, 721 (1985)). Moreover, even absent express preemption, when "a federal statute made 'in pursuance' of the Constitution is so comprehensive that [it occupies the field leaving] no room for state action," preemption also occurs. *Becker*, 318 Md. at 86, 566 A.2d at 1106. We deal here with implied preemption of the "occupy-the-field" variety.

The Commerce Clause of the United States Constitution (art. I, § 8, cl. 3) gives Congress the power to control air traffic. *City of Burbank*, 411 U.S. at 625, 93 S. Ct. at 1855-1856, 36 L. Ed. 2d at 549. Pursuant to that power, Congress has enacted the Federal Aviation Act of 1958, 72 Stat. 731, and amended it by the Noise Control Act of 1972, 86 Stat. 1234. *See* 49 U.S.C. § 1301 *et seq.* The Noise Control Act provides that

> In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application

> of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter. No exemption with respect to any standard or regulation under this section may be granted under any provision of this chapter unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

49 U.S.C. § 1431(b)(1). Under the same section, the EPA is required to

> submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare.

49 U.S.C. § 1431(c)(1). In addition, numerous regulations bear on the topic of control of aircraft noise. *See, e.g.*, 14 C.F.R. parts 36.1-36.7, 36.9, 36.101, 36.103, 36.201, 36.301, 36.501 (1989). The validity of the statutes and regulations is not questioned. Their implied preemptive effect is questioned. But that issue has in large part been resolved by the Supreme Court of the United States.

Appendix A

That Court's decision in *City of Burbank, supra*, is the "preeminent authority on the question of federal preemption in the area of aviation." *Blue Sky Entertainment, Inc. v. Town of Gardiner*, 711 F. Supp. 678, 691 (N.D.N.Y. 1989). Furthermore, *City of Burbank* speaks directly to the problem of local efforts to control aircraft engine noise. It is upon that problem that the cited cases focus; we need not decide what the full preemptive reach of federal aviation law may be. *See Ward v. State*, 280 Md. 485, 495-496, 374 A.2d 1118, 1123-1124 (1977), *cert. denied*, 434 U.S. 1011, 98 S. Ct. 723, 54 L. Ed. 2d 754 (1978) ("Congress has not occupied the entire field of aeronautics by the Federal Aviation Act of 1958").

In *City of Burbank*, the city enacted an ordinance that made it unlawful for the operator of the privately owned Hollywood-Burbank Airport to allow any pure jet aircraft to take off between 11:00 p.m. of one day and 7:00 a.m. of the next. This curfew was markedly similar to condition 3 as imposed by the Board in the case before us. The Supreme Court concluded that federal preemption — implied from federal occupation of the field of aircraft noise regulation — rendered the ordinance unconstitutional. 411 U.S. at 633, 93 S. Ct. at 1859-1860, 36 L. Ed. 2d at 554.

The Supreme Court recognized that " 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress . . . .' " *City of Burbank*, 411 U.S. at 633, 93 S. Ct. at 1859, 36 L. Ed. 2d at 553 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447, 1459 (1947)). It recognized that the federal legislation before it in *City of Burbank* contained "no express provision of pre-emption . . . ." 411 U.S. at 633, 93 S. Ct. at

1859, 36 L. Ed. 2d at 553. But it pointed out that a " 'scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . .' " *Id.* (again quoting Rice).

The Court examined at length the provisions of the Federal Aviation Act and the Noise Control Act. It scrutinized the legislative history, which included a Senate Report and a letter from the Secretary of Transportation. The Senate Report explained, " 'States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under (the Noise Control Act of 1972).' " The letter from the Secretary of Transportation to Senator Monroney declared that " 'State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.' " 411 U.S. at 634-635, 93 S. Ct. at 1860, 36 L. Ed. 2d at 554-555 (quoting S. Rep. No. 92-1160, pp. 10-11, 1972 U.S. Code Cong. & Admin. News 4663 and 1968 U.S. Code Cong. & Admin. News 2693-2694). It gave weight to the remarks of the Chairman of the House Committee on Interstate and Foreign Commerce to the effect that "we do not want" cities and states "to pass noise regulations." 411 U.S. at 636-637, 93 S. Ct. at 1861, 36 L. Ed. 2d at 555 (quoting 118 Cong. Rec. 37083 (1972)). It noted Senator Tunney's view that under the 1972 Act there would be " 'proposed means of reducing noise in airport environments through the application of emission controls on aircraft, the regulation of flight patterns and aircraft and airport operations, and *modifications in the number, frequency, or scheduling of flights* [as well as] . . . *the imposition of curfews on noisy airports* . . . .' " 411 U.S. at 637, 93 S. Ct. at 1861, 36 L. Ed. 2d at 555-556 (quoting 118 Cong. Rec. 37317 (1972)) [emphasis added in Supreme Court opinion].

Appendix A

The Court concluded that "[i]t is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." 411 U.S. at 633, 93 S. Ct. at 1859-1860, 36 L. Ed. 2d at 554. The Circuit Court for Carroll County found *City of Burbank* dispositive; the Court of Special Appeals attempted to distinguish the case. There are distinctions, but they make no constitutional difference.

The intermediate appellate court pointed out that Bay Soaring uses the Woodbine Airport for recreational flights while the Hollywood-Burbank Airport is commercial. Actually, the record shows that Bay Soaring is engaged in a commercial operation, but the Court of Special Appeals correctly observed that "[t]he airplanes involved in Bay Soaring's enterprise are not used for the transport of goods or persons in the stream of commerce" and that "FAA control over glider port operations is minimal."[3] *Schwartz v. Harrison, supra*, slip op. at 4. It thought that Board condition 2 was not preempted because glider take-offs were not subject to FAA control. *Id.*, slip op. at 3-4. *But see* n.3, *supra*. It thought that condition 3 was not preempted because "[t]he *City of Burbank* Court was concerned with the congestion and the loss of efficiency that might be caused by the imposition of a curfew at a commercial airport" — a concern not present in the case of the Woodbine facility. *Id.*, slip op. at 5.

Obviously, the small Woodbine airport is very different from Hollywood-Burbank. Both, however, are privately owned. The *City of Burbank* holding applies to privately owned airports as

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3. FAA regulations nevertheless provide some control, including a requirement that under some circumstances the tow plane pilot notify "the FAA flight service station . . . before conducting any towing operations . . . ." 14 C.F.R. § 91.17(a)(4) (1989).

well as publicly owned ones. The Supreme Court did not make an exception for small airports that do not involve inter-airport commercial cargo or passenger flights, or for activities not expressly governed by federal statute or regulation.[4] If we were dealing with the sort of preemption that arises from conflict between federal and state enactments, these considerations might be pertinent. But we are dealing with preemption by occupation of the field. Once the field is occupied by the federal government, neither state nor local government may enter it. And occupation of the field does not mean that every blade of grass within it must be subject to express federal control; it means only that Congressional intent demonstrates that the area is subject to exclusive federal control, whether potential or actual.

Among the concerns of the Supreme Court in *City of Burbank* was the efficient and safe use of airspace and "the flexibility of [the] FAA in controlling air traffic flow." 411 U.S. at 639, 93 S. Ct. at 1862, 36 L. Ed. 2d at 557 [footnote omitted]. Any nonproprietary and nonfederal attempt to control noise was preempted if it might affect that air traffic flow. Hence, "the pervasive control vested in EPA and in [the] FAA under the 1972 Act seems . . . to leave no room for local curfews or other local [noise] controls." 411 U.S. at 638, 93 S. Ct. at 1862, 36 L. Ed. 2d at 556.

The scope of that ruling is emphasized by Justice (now Chief Justice) Rehnquist's dissent in *City of Burbank*, 411 U.S. 640,

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4. *City of Burbank* does hold open the possibility that an airport proprietor (including a municipality) may issue valid regulations controlling airport noise. 411 U.S. at 635-636 n.14, 93 S. Ct. at 1861 n.14, 36 L. Ed. 2d at 555 n.14. We shall have occasion to refer to this exception later. For now, it is enough to note that Carroll County is not the proprietor of Woodbine Airport.

93 S. Ct. 1863, 36 L. Ed. 2d 558. Writing for himself and three of his colleagues, Justice Rehnquist read legislative history quite differently from the way the majority interpreted it. He argued that noise regulation was a matter of particularly local concern, 411 U.S. at 643, 93 S. Ct. at 1864, 36 L. Ed. 2d at 559, and that the legislative history showed an intent not to diminish the power to abate noise through local zoning or other regulations. 411 U.S. at 650, 93 S. Ct. at 1868, 36 L. Ed. 2d at 563. He believed that federal preemption extended only to the regulation of technological methods of reducing the output of noise by aircraft. 411 U.S. at 651, 93 S. Ct. at 1868, 36 L. Ed. 2d at 563-564. These views, however, were rejected by the majority, which clearly had a vastly more expansive view of the extent of the preemption. It is the majority view that binds us.

The reach of *City of Burbank's* preemption holding is also confirmed by what appears to be almost uniform interpretation by other courts. Indeed, we have been unable to discover a case (other than the opinion of the Court of Special Appeals) that squarely supports the position of the Neighbors and the County.

The Neighbors, for example, cite *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981). In that case, a curfew and other noise control regulations were upheld. But the city of Santa Monica, as the court pointed out, was the proprietor of the airport in question, and thus within the proprietor exception to the general rule of *City of Burbank*. 659 F.2d at 103-104.

The proprietor exception, as various courts have recognized, is based on the fact that an airport proprietor may be liable for excessive noise emanating from aircraft that use the airport. *See, e.g., Griggs v. Allegheny County*, 369 U.S. 84, 82 S. Ct. 531,

7 L. Ed. 2d 585 (1962); *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946). To guard against liability, the airport proprietor should be able to promulgate reasonable noise regulations. It was that window of nonpreemption that the Supreme Court left open in *City of Burbank, see* n.4, *supra*, and a number of courts have relied on it to hold that proprietary regulations of aircraft noise are not preempted. For additional cases explaining the proprietor's exception, see, for example, *City of Blue Ash v. McLucas*, 596 F.2d 709, 712 (6th Cir. 1979); *United States v. New York*, 552 F. Supp. 255 (N.D.N.Y. 1982). *cert. denied*, 466 U.S. 936, 104 S. Ct. 1907, 80 L. Ed. 2d 456 (1984); *National Aviation v. City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976); *Air Transport Ass'n of America v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975). As we already have pointed out, Carroll County is not the proprietor of Woodbine Airport; the proprietor exception is not available to it.

Carroll County asserts that *Wright v. County of Winnebago*, 73 Ill. App. 3d 337, 391 N.E.2d 772 (1979), demonstrates the validity of the Board's conditions. It does not. In *Wright* local authorities, acting under a zoning ordinance, denied the Wrights permission to establish a restricted aircraft landing area from which Mr. Wright proposed to commute to work by plane. There is some attempt in *Wright* to distinguish *City of Burbank* on grounds similar to those put forward by the Court of Special Appeals here. 73 Ill. App. 3d at 343-344, 391 N.E.2d at 777-778. But the essential rationale in *Wright* is that local government may exercise zoning authority to prohibit a restricted landing area altogether. *Id.* at 344, 391 N.E.2d at 777-778. To patently deny permission to create an airport-like facility does not invade the noise-control field that is federally occupied, for that sort of zoning denial cannot affect the way in which aircraft operate in navigable airspace.

Indeed, in *Garden State Farms, Inc. v. Bay*, 77 N.J. 439, 447, 390 A.2d 1177, 1181 (1978), relied on by the Neighbors and the County, the New Jersey Supreme Court conceded that state and local authority over the operation and navigation of aircraft was preempted. The court held, however, that a local zoning ordinance could validly prohibit a small helistop. To say that local authority may use its zoning power to ban a certain use is not the same as to say that it may permit a use subject to conditions that affect air navigation. *City of Burbank* does not preempt all state and local zoning power with respect to airports. A zoning ordinance that does not regulate aircraft noise emissions or the actual conduct of flight operations may withstand a preemption argument. *Faux-Burhans v. Frederick County*, 674 F. Supp. 1172 (D. M. 1987), *aff'd without opinion*, 859 F.2d 149 (4th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S. Ct. 869, 102 L. Ed. 2d 992 (1989). *See also Gateway Motels, Inc. v. Monroeville*, 106 Pa. Commw. 42, 525 A.2d 478 (Pa. Commw. Ct. 1987) (zoning conditions requiring alarm system and installation of fire equipment at heliport not preempted under *City of Burbank*). The problem before us is that Board conditions 2 and 3 do both. Local government may not adopt noise abatement plans that impinge on aircraft operations. *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, *Department of Transportation v. San Diego Unified Port District*, 455 U.S. 1000, 102 S. Ct. 1631, 71 L. Ed. 2d 866 (1982) (striking down curfew).

The Neighbors also take comfort from cases such as *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S. Ct. 2099, 2100, 104 L. Ed. 2d 661 (1989), but *Bieneman* is cold comfort for them. *Bieneman* was an action to recover damages by one adversely affected by noise from O'Hare Airport. As Judge Easterbrook points out, for the court,

"Bieneman wants damages, not regulation" and *City of Burbank* dealt with regulation. 864 F.2d at 472.

The *Bieneman* court held that even though the substantive area of aircraft noise regulation was preempted by federal law, common law remedies were not. 864 F.2d at 471. That is also the holding of *Wood v. City of Huntsville*, 384 So. 2d 1081 (Ala. 1980). In that case Dr. Wood's neighbors sought to enjoin his operation of a helicopter from his roof. The Supreme Court of Alabama reasoned that "[i]n the specific area of noise control, state and local governments cannot use their police powers to control noise by regulating the flight of planes." *Id.* at 1084. But it held that liability in nuisance might exist despite federal regulation of airport activities. *Id.* at 1085. Of course, neither the Neighbors nor Carroll County are suing for money damages because of airport noise or in nuisance. Rather, the County is seeking to use its "police powers to control noise by regulating the flight of planes."

It is that sort of regulation that has been repeatedly invalidated on the ground of federal preemption. *See, e.g., Pirola v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983) (curfew and air traffic pattern ordinances preempted); *Northeast Phoenix Homeowners' Ass'n v. Scottsdale Municipal Airport*, 130 Ariz. 487, 636 P.2d 1269 (Ariz. Ct. App. 1981) (judicially-imposed curfew preempted); *Gary Leasing Inc. v. Town of Pendleton*, 127 Misc. 2d 194, 485 N.Y.S.2d 693 (N.Y. Sup. Ct. 1985) (curfew and limitation on maximum number of planes that could be based at airport preempted).[5]

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5. For a list of some 13 earlier decisions from several federal circuits and six states that have accepted, "without contrary authority" the "proposition

(Cont'd)

Appendix A

All the cases finding preemption do not necessarily involve large airports. The airport in *United States v. City of Blue Ash*, 487 F. Supp. 135 (S.D. Ohio, W.D. 1978), *aff'd mem.* 621 F.2d 227 (6th Cir. 1980), was not served by any certified air carrier, had no regularly scheduled flights, and lacked a control tower. It was a general aviation airport. Nevertheless, a noise control ordinance was preempted because it dealt with noise control of aircraft in flight in navigable airspace. Similarly, a federal district court struck down an attempt by the Town of Gardiner, New York, to regulate small airports and parachute jumping by, among other things, prohibiting night jumping and banning aircraft that emitted noise over a certain level. In *Blue Sky Entertainment, Inc. v. Town of Gardiner, supra*, 711 F. Supp. at 694-695, the court explained that the town could not use its police powers to control aircraft noise by regulating the flight of aircraft. It pointed out that "[w]ith the exception of reasonable proprietary regulations . . . courts have uniformly struck down attempts by local governments to regulate the noise of aircraft ."[6] *Id.* at 695 [footnote and citation omitted].

(Cont'd)
that the federal government has preempted the area of flight control regulation to eliminate or regulate noise," see *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1315 n.22 (9th Cir. 1981), *cert. denied, Department of Transportation v. San Diego Unified Port District*, 455 U.S. 1000, 102 S. Ct. 1631, 71 L. Ed. 2d 866 (1982). We note, too, that in *Ward v. State*, 280 Md. 485, 496, 374 A.2d 1118, 1124 (1977), *cert. denied*, 434 U.S. 1011, 98 S. Ct. 723, 54 L. Ed. 2d 754 (1978), we referred to *City of Burbank's* holding with respect to noise control preemption, but construed the holding "as limited to that area of aeronautics."

6. The Neighbors aver that Congressional action since *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973), has modified the holding of that and other cases by showing a less

(Cont'd)

Appendix A

III.

The Board's condition 3 — the curfew — falls directly within the preemption rule of *City of Burbank* as well as that of other cases we have cited. It is plainly an attempt to limit aircraft noise by regulating the operation of aircraft in navigable airspace over which the FAA has control. Condition 2 is a less direct effort

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(Cont'd)

preemptive Congressional intent. They cite the Aviation Safety and Noise Abatement Act of 1979 (49 U.S.C. §§ 2101 *et. seq.*) 101 Stat. 1489, 1523, as well as the Airport and Airway Improvement Act of 1982 (49 U.S.C. §§ 2201 *et seq.*) 101 Stat. 1487-1507. To these we might add the Airport Noise Compatibility Planning Regulations of 1981, 14 C.F.R. §150 (1989), the Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a) and (b), 92 Stat. 1708, *as amended by* 98 Stat. 1709, and the Aviation Noise Abatement Policy of 1976, U.S. Department of Transportation (November 18, 1976). *See* Bennett, *Airport Noise Litigation*, 47 J. Air. L. & Com. 449, 452-453 (1982). The Neighbors see support for their view in some legislative history of the 1979 Act emphasizing state and local responsibility for assuring that land use planning and zoning "are compatible with present and projected aircraft noise exposure in the area." S. Rep. No. 52, 96 Cong. 2d Sess. (1980), 1980 U.S. Code Cong. & Admin. News 89, 91. What this language deals with is not local control of aircraft noise but local zoning to keep residential and other incompatible activities away from airports. *See Greenberg v. State*, 66 Md. App. 24, 502 A.2d 522, *cert. denied*, 305 Md. 621, 505 A.2d 1342 (1986) (discussing noise zones under Maryland airport zoning law; Md. Code (1977, 1989 Supp.), §§ 5-801 through 5-823 of the Transportation Article).

Review of post-*City of Burbank* federal airway legislation and the numerous regulations adopted pursuant thereto shows that the federal presence in the field has become even more pervasive than it was in 1973. No court has agreed with the Neighbors that this legislation has tended to ameliorate the holding of *City of Burbank*. *See, e.g., San Diego Unified Port District*, 651 F.2d at 1313 n.15 (Acts subsequent to *City of Burbank* manifest Congress's continuing intent to preempt local regulation).

to control noise by controlling aircraft operations, but it is one, nevertheless. *See Gary Leasing, Inc.*, 127 Misc. 2d at 195, 485 N.Y.S.2d at 694. We hold that both conditions are preempted under *City of Burbank* and, therefore, unconstitutional.

This holding compels us to reverse the judgment of the Court of Special Appeals with respect to Board conditions 2 and 3. Our holding, in effect, affirms the judgment of the Circuit Court for Carroll County which remanded the case to the Board for further proceedings in light of *O'Donnell v. Bassler*, 289 Md. 501, 513-514, 415 A.2d 1003, 1010 (1981), *cert. denied*, 299 Md. 426, 474 A.2d 219 (1984) (county zoning board has authority as administrative body to determine whether to grant exception).

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED IN PART AND AFFIRMED IN PART. CASE REMANDED TO THAT COURT WITH DIRECTION TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY APPELLEES.

Appendix A

IN THE COURT OF APPEALS OF MARYLAND

No. 89

September Term, 1989

ROBERT E. HARRISON ET AL.

v.

BERNARD A. SCHWARTZ ET AL.

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Chasanow,

JJ.

Dissenting opinion by McAuliffe, J.

Filed: April 19, 1990

McAuliffe, J., dissenting.

I cannot agree that the Congress of the United States intended to pre-empt the right of Carroll County to impose the conditions at issue here, and I do not believe that the United States Supreme Court held to the contrary in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed. 2d 547 (1973). In *City of Burbank*, the Supreme Court dealt with a city

ordinance that prohibited jet aircraft from taking off from the Hollywood-Burbank Airport between 11 p.m. of one day and 7 a.m. the next day. This ordinance affected a regularly scheduled flight of a commercial air carrier that originated in Oakland and was scheduled to stop at Hollywood-Burbank before departing for San Diego. The Court held that "airspace management" had been pre-empted by the United States, and that the City of Burbank regulation invaded the field of "airspace management." The Court noted the findings of the trial judge that:

> The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. Such a result is totally inconsistent with the objectives of the federal statutory and regulatory scheme.
>
> * * *
>
> The imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable airspace.

Id. at 627-28.

The case before us does not involve scheduled airline service, or a public use airport. It does involve a small, grass airstrip from which one or two powered aircraft operate to tow gliders into

the air. This airport is privately owned. It is not proposed to be a general aviation airport. It will not be open to other aircraft wishing to land or take off. The conditions imposed by the Carroll County Board of Zoning Appeals will not "increase congestion, cause a loss of efficiency, [or] aggravate the noise problem," as was the case in *City of Burbank*. *Id.* at 628.

The Woodbine Airstrip is not a "public use airport" within the coverage of the Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. §§ 2101 *et. seq.*, because it is not a "public airport," a "privately owned reliever airport," nor a "privately owned airport which is determined . . . to enplane annually 2,500 or more passengers and receive scheduled passenger service of aircraft." 49 U.S.C. § 2202(A)(18).

Although all aircraft, including those operating from the Woodbine Airstrip, are subject to certain Federal Aviation Administration regulations, there is no control tower at Woodbine, and no direct Federal Aviation Administration supervision of the operation of the airport.

As the Supreme Court has pointed out, the implied pre-emption of this field by Congress must necessarily be very broad. Notwithstanding that breadth, I do not believe that it extends so far as to preclude the local imposition of conditions upon the grant of permission to operate a facility of this type, where airspace management is not implicated.

I concede that the majority opinion of a sharply divided Supreme Court in *City of Burbank* may be read as expansively as the majority of this Court suggests. I do not agree that such a broad reading is mandated, or reasonable as applied to the facts of the case before us. I would hold that the imposition of

conditions two and three was a valid exercise of the authority of the Carroll County Board of Zoning Appeals.

APPENDIX B — OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 25912 Law

In The Circuit Court
For Carroll County

JERRY GAUDET, ET AL.

Appellants

vs.

CARROLL COUNTY BOARD OF ZONING APPEALS, ET AL.

Appellees

No. 26449 Law

In The Circuit Court
For Carroll County

IN THE MATTER OF APPLICATION OF ROBERT E. HARRISON AND JERRY GAUDET (BAY SOARING) FOR A CONDITIONAL USE PERMIT FOR AN AIRPORT LANDING SITE

vs.

THE BOARD OF ZONING APPEALS CASE NO. 1988

Appendix B

In 1972 Appellants received a Conditional Use Permit to operate a private airport. On December 20, 1982, the Board of Zoning Appeals for Carroll County revoked Appellant's Permit, ruling their existing use different from that approved. Appellants appealed (Case No. 25912) and thereafter applied for a new Conditional Use Permit, which the Board granted on May 11, 1984, subject to the following eight conditions:

> 1. Within thirty (30) days from the date of this decision, the Applicant must extend the runway 500 feet to the north and reduce the runway 500 feet from the south property line in order to provide greater distance for aircraft to gain altitude before crossing the southern property line and thereby reduce the adverse effect which the noise of aircraft taking-off causes the neighboring properties. Specifically, the runway may not be closer at its southern end to the property line than 500 feet.
>
> 2. Aircraft take-offs shall be separated by intervals of at least 15 minutes in order to minimize the adverse effects of aircraft engine noise upon the residents of the surrounding area and to reduce the intensification of the use of the property in what is otherwise a primarily rural residential area.
>
> 3. Aircraft take-offs shall not be made before 9:00 a.m. or later than 7:00 p.m. on any day.
>
> 4. The operations building which is shown to exist in the "C" Conservation District must be moved to the "A" Agricultural District, and the

property owner must apply for and receive a building permit, zoning certificate and use and occupancy permit including site plan approval before using the building for any purpose from the date of this decision.

5. The Applicant must prepare and submit a site development plan in accordance with the provisions of Article 10, Section 10.4(d) of the *Carroll County Zoning Ordinance* within one (1) month of the date of this decision; provided that the Board may authorize an extension of one (1) month based upon a written request by the Applicants justifying to the Board's satisfaction such an extension and without necessity for a further hearing.

6. The Applicant must erect a sign at or adjacent to the entrance to the site. The sign should identify the property and the use with sufffficient clarity that a reasonable person would be able to find the site if he were looking for it. The area of the sign face shall not be greater than three (3) feet by four (4) feet.

7. The Applicant will design take-off and landing patterns in such a way that they will minimize the adverse effect upon neighboring residents. In addition, the Applicant shall require people taking-off and landing from the airfield to be familiar with the landing and take-off patterns and to use them.

Appendix B

> 8. Any failure to comply strictly with the above conditions constitutes a basis for this Board to void the approval granted hereby.

Appellants appealed the imposition of the conditions (Case No. 26499) and on May 25, 1984 Case Nos. 25912 and 26499 were consolidated. By Order of August 19, 1986, this Court reversed the Board's revocation of Appellants' Permit, thus rendering Case No. 26499 moot. On June 23, 1987, the Court of Special Appeals reversed as to Case No. 25912 and remanded Case No. 26499 for further proceedings. Accordingly, on July 11, 1988, a hearing was held and the matter was held *sub curia.*

Appellants attack the legitimacy and reasonableness of the eight conditions. They begin by arguing that Conditions 1, 2, 3 and 7 are invalid, as local regulation of airport noise is preempted by Federal Law. The Court agrees, in part. *In City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973) the Supreme Court found Federal preemption of local regulation of aircraft noise emissions at airports by Federal Statute, *viz* the Federal Aviation Act of 1958, 72 Stat. 731, as amended by the Noise Control Act of 1972, 86 Stat. 1234 and the regulations promulgated pursuant thereto in 14 CFR Pts. 71, 73, 75, 77, 91, 93, 95 and 97. Conditions 1, 2, 3 and 7 are facially, and are explained in the Board's 1984 Decision as specifically designed to mitigate the effect of airport noise on the community:

> The protestants found the noise to be objectionable. During the hearing an attempt was made to introduce evidence concerning decibel levels. Unfortunately, the Board did not have the benefit of an expert to interpret the decibel readings

> and cannot rely on the readings for its decision. Instead, the Board must rely upon the testimony of the neighbors which is sufficient to show clearly that the proposed use has a substantial impact on them. Complaints concerning noise were voiced both because of its volume and its frequency. (P. 7, Case No. 1988).

While regulation of noise is generally an acceptable exercise of police power, *City of Burbank* requires that the Court find Conditions 2, 3 and 7 invalid; they infringe upon the Federally preempted regulation of navigable airspace, by directly affecting the manner in which flight operations will be conducted. Clearly, the Board's imposition of a curfew, and its regulation of take-off intervals and flight patterns conflicts with the Federal attempt to regulate air safety. "If we were to uphold the . . . ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would surely limit the flexibility of FAA in controlling air traffic flow". *City of Burbank*, supra, at 1862.

City of Burbank, however, does not support Appellants' claim that the Board is preempted in its attempt to create a 500 foot southern set-back of Appellant's runway (Condition 1). In this regard, the Court finds the Federal cases persuasive. In *Faux-Burhans v. County Commissioners of Frederick County*, 674 F.Supp. 1172 (D.Md. 1987) the Court ruled Frederick County's set-back requirements applied to airport operations and were not preempted, since they in no way inhibited free transit of navigable airspace. "No federal law gives a citizen the right to operate an airport free of local zoning control." *Id.* at 1174.

Having ruled Conditions 2, 3 and 7 invalid, the Court next

examines the validity of Conditions 1, 4 and 5 independent of the preemption issue. (Condition 6 was not objected to and is not in issue; Condition 8, according to Appellant, "is not really a condition. Petitioner objects to it insofar as it purports to provide a basis for revocation above and beyond any basis which, may exist as a matter of law." To the contrary, the Court finds Condition 8 to be no more than an articulation of the prerequisite implicit in any conditional use, i.e. compliance with conditions imposed.) While the Board's authority to impose the remaining Conditions under Section 17.2 of the Zoning ordinance is apparent, see *Montgomery County v. Mossburg*, 228 Md. 555 (1962), and in fact was conceded in prior argument, Appellants challenge the *reasonableness* of Conditions 1, 4, and 5.

The Court finds Condition 1 to be a reasonable imposition of a set-back requirement designed to accommodate both the conditional use and the concerns of the surrounding community; again, it was supported by substantial testimony regarding the effect of airport noise on the airport's neighbors. The reasonableness of Condition 4 (requiring the operations building to be moved) may be moot as it was proffered at the July 11, 1988 hearing that the building no longer exists; however, assuming it remains in issue, the Court finds Condition 4 represents a procedurally improper attempt by the Board to bring the structure in question into compliance with the County Zoning Ordinance. The issue of whether Appellants' operations building validly exists as a non-conforming use has yet to be thoroughly litigated pursuant to the provisions of the Ordinance; the Court finds the Board's circumvention of that process via the expediency of a Condition to be improper.

Finally, in addressing the propriety of Condition 5, the Court turns to Section 10.4(d) of the Zoning Ordinance, which reads,

in part:

> (d) (Added 9-22-77) All applications for permitted or conditional uses shall be subject to a site plan review by those agencies determined appropriate by the Zoning Administrator, who, following any referral to such agencies, shall cause the plan to be presented to the Commission which shall have the authority to approve the plan as presented, or approve the plan with modifications or conditions. No Zoning Certificate shall be issued by the Zoning Administrator until the Commission or its duly authorized representative, should the Commission expressly delegate its authority, has approved the plan.

The Court finds the Condition valid. It is both in accord with the language of the Ordinance above and well suited to the Board's expressed goal of protecting neighboring interests — a concern prompted by significant evidence presented at the Board hearing.

With four of the Board's eight Conditions today deemed improper, the Court finds it necessary to remand the case to the Board for further proceedings. *See O'Donnell v. Bassler*, 289 Md. 501 (1981). In *O'Donnell*, Appellants received a Special Exception Use Permit for a commercial aircraft landing field from the Board of Appeals of Howard County, subject to 13 Conditions. After striking 5 of the Conditions as imposed without proper authority, the Circuit Court determined that the grant of the requested Special Exception Use Permit was supported by substantial evidence, even without the conditions. Accordingly, the Court modified the Board's Order by eliminating the violative Conditions and affirmed the Board's Order as modified.

Appendix B

The Court of Appeals reversed, summarizing Federal and Maryland Law on the matter:

> It is a fundamental principle of administrative law that a reviewing court should not substitute its judgment for the expertise of the administrative agency from which the appeal is taken. This principle underlies the rule that if an administrative function remains to be performed after a reviewing court has determined that an administrative agency has made an error of law, the court ordinarily may not modify the agency order. Under such circumstances, the court should remand the matter to the administrative agency without modification. Of course, the Court need not remand if the modification is so minor as to make remand inappropriate, or if remand is otherwise futile. *Id.* at 509-10 (citations omitted).

In imposing the eight Conditions, airport noise appears to have been the Board's paramount concern; and part of its method for addressing that concern we today rule invalid. *O'Donnell* makes clear that it is now for the Board, and not the Court, to decide whether the Conditional Use should be granted absent the excised Conditions.

Finally, by Motion of March 28, 1988, Appellee requests that the Stay of Enforcement ordered by the Court on May 25, 1984 be lifted, thus requiring Appellants to comply with the Board's 1984 Decision pending final judgment. The Order in question reads, in part:

ORDERED this 25th day of May, 1984, that

> zoning enforcement action based upon or related to the decisions of the Board in the above-captioned cases be, and it is hereby, STAYED until such time as a final decision in *both* cases is rendered by this Court. (emphasis added)

As Case No. 26499 has yet to reach the aforementioned posture, the Court will deny Appellee's Motion.

Therefore, it is this 23rd day of August, 1988, by the Circuit Court for Carroll County, ORDERED that Case No. 26499 is hereby REMANDED to the Board of Zoning Appeals for Carroll County for further proceedings, and

IT IS FURTHER ORDERED that Appellee's Motion to Lift Stay be and is hereby DENIED.

s/ D.C. Gilbert
Judge

TRUE COPY TEST
s/ Illegible
Clerk

August 29, 1988

APPENDIX C — OPINION AND ORDER OF THE CIRCUIT COURT FOR CARROLL COUNTY

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1425

September Term, 1988

BERNARD A. SCHWARTZ, ET AL.

v.

ROBERT E. HARRISON, ET AL.

Gilbert, C.J.
Bishop
Fischer,

JJ.

PER CURIAM

Filed: May 4, 1989

This is an appeal from an order by the Circuit Court for Carroll County invalidating in part and remanding a decision by the Board of Zoning Appeals.

Dissatisfied with that decision, zoning protestants Bernard Schwartz and the Carroll County Commissioners have raised two issues for our review:

Appendix C

I. Whether the conditions attached to the conditional use permit are invalid due to preemption by federal law.

II. Whether the circuit court abused its discretion in allowing the Stay of Enforcement to remain in effect.

I. Preemption

Judge Frederick W. Smalkin wrote in *Faux-Burhans v. County Commissioners of Frederick County*, 674 F. Supp. 1172, 1174 (D. Md. 1987):

> "Pre-emption of state and local regulation of a particular subject matter by Congressional enactment is a well-known, but infrequently encountered phenomenon of American constitutional law, with ancient (at least by American standards) origins. *See Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1852). It poses entirely a question of federal statutory construction, depending for its application in a particular case upon ascertainment of the intent of Congress to enact a pervasive scheme of regulation of the subject matter. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 . . . (1973)."

Ordinarily, a local administrative authority such as the Board of Zoning Appeals has delegated to it the police power to attach conditions to the zoning uses. Yet, the otherwise valid police power may be preempted by federal regulations governing the same subject matter. *City of Burbank v. Lockheed Air Terminal, Inc., supra*. The Circuit Court for Carroll County (Gilmore, J.) held

that three conditions prescribed by the Board were invalid because they were preempted by federal law.

The three conditions nullified by Judge Gilmore were:

> "No. 2. Aircraft take-offs shall be separated by intervals of at least 15 minutes in order to minimize the adverse effects of aircraft engine noise upon the residents of the surrounding area and to reduce the intensification of the use of the property in what is otherwise a primarily rural residential area.
>
> No. 3. Aircraft take-offs shall not be made before 9:00 a.m. or later than 7:00 p.m. on any day.
>
> * * *
>
> No. 7. The Applicant will design take-off and landing patterns in such a way that they will minimize the adverse effect upon neighboring residents. In addition, the Applicant shall require people taking-off and landing from the airfield to be familiar with the landing and take-off patterns and to use them."

Judge Gilmore relied upon the *City of Burbank* decision in making his determination that federal law had preempted the subject matter addressed by three conditions.

The Supreme Court in *City of Burbank* struck down a city ordinance that prohibited jet aircraft take-offs from the

Appendix C

Hollywood-Burbank airport between 11:00 p.m. and 7:00 a.m. The curfew was intended as a local regulation of aircraft noise at the Hollywood-Burbank airport. The Court held that the curfew was preempted by the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972, 49 U.S.C. § 1431. The Court ruled that preemption existed because of the "pervasive nature of the scheme of federal regulation of aircraft noise." *City of Burbank*, 411 U.S. at 633.

The Federal Aviation Act, as amended by the Noise Control Act of 1972, provides in pertinent part:

> "In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with

> EPA as soon as practicable after the exemption is granted."

49 U.S.C. § 1431(b)(1972). The Supreme Court interpreted that statute as vesting such pervasive control in the FAA and EPA that no State and local governments have authority to control aircraft noise through the regulation of the flight of aircraft. *City of Burbank*, 411 U.S. at 638.

Condition 7 imposed by the Board is clearly preempted by federal law since it is concerned with "the actual conduct of flight operations in navigable airspace." *Faux-Burhans*, 674 F. Supp. at 1174. The Federal Aviation Act explicitly provides, "The United States of America is declared to possess and exercise complex and exclusive national sovereignty in the airspace of the United States . . . ." *City of Burbank*, 411 U.S. at 626-27, quoting Section 1108(a) of the Federal Aviation Act, 49 U.S.C. § 1508(a).

Conditions 2 and 3, we believe, are not preempted by federal law. A significant fact distinguishing the instant case from *City of Burbank* is that Bay Soaring operates a private airport used only for recreation flights while the Hollywood-Burbank airport is commercial. The grounds for preemption which the Court considered in *City of Burbank* included both FAA control and a concern for the impact of the city ordinance on interstate commerce. *City of Burbank* 411 U.S. at 627. The airplanes involved in Bay Soaring's enterprise are not used for the transport of goods or persons in the stream of commerce. Moreover, FAA control over glider port operations is minimal. Although the pilots and glider planes are subject to FAA certification, the FAA exercises no control over the airport itself. The FAA does not regulate the take-off and landing patterns of glider planes, nor does it regulate flight patterns for gliders.

Appendix C

Condition 2 of the zoning board's order regulates the timing of glider take-offs. Inasmuch as that activity is subject to no FAA control, we believe the trial judge erred in finding it preempted by federal law.

Condition 3 imposes a curfew on the glider port. Although the Court in *City of Burbank* invalidated a similar curfew, an examination of its reasoning for that decision leads to the conclusion that the holding is inapposite to condition 3 in the instant case. The *City of Burbank* Court was concerned with the congestion and the loss of efficiency that might be caused by the imposition of a curfew at a commercial airport. That concern does not apply to the instant case. There is no reason to expect that a glider port will experience a rush of soaring enthusiasts who wish to be towed aloft at 6:55 p.m., just prior to the curfew.

II. Stay of Enforcement

Judge Gilmore declined to lift the Stay of Enforcement imposed on May 25, 1984. The judge determined that the stay should remain in effect because the court, after invalidating three of the eight conditions imposed upon the use permit by the Board of Zoning Appeals, was required to remand the matter to the Board of Zoning Appeals. *O'Donnell v. Bassler*, 289 Md. 501 (1981) (when an administrative function remains to be performed after the reviewing court has found an error of law, the court should remand the matter to the administrative agency). Inasmuch as the Board must determine whether to grant the permit with the remaining conditions, or perhaps impose additional conditions, it was appropriate for the court to continue the vitality of the stay.

As we see it, Judge Gilmore possessed the authority to grant the Stay of Enforcement, Md. Rule B6, and he did not abuse his discretion in refusing to lift that stay.

Appendix C

JUDGMENT REVERSED IN PART AND AFFIRMED IN PART.

COSTS TO BE DIVIDED EQUALLY BETWEEN THE APPELLANTS AND THE APPELLEES.

APPENDIX D — RELEVANT STATUTORY PROVISIONS

Federal Aviation Act of 1958, 49 U.S.C. Section 1301, *et seq.*:

GENERAL PROVISIONS

§ 1301. Definitions.

As used in this Act, unless the context otherwise requires —

(1) "Administrator" means the Administrator of the Federal Aviation Agency [Federal Aviation Administration].

(2) "Aeronautics" means the science and art of flight.

(3) "Air Carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

(4) "Air Commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

Appendix D

(5) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

(6) "Aircraft engine" means an engine used, or intended to be used, for propulsion or aircraft and includes all parts, appurtenances, and accessories thereof other than propellers.

(7) "Airman" means any individual who engages, as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while under way; and (except to the extent the Administrator [Secretary of Transportation] may otherwise provide with respect to individuals employed outside the United States) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air-traffic control-tower operator.

(8) "Air navigation facility" means any facility used in, available for use in, or designed for use in, aid of air navigation, including landing areas, lights, any apparatus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing and takeoff of aircraft.

Appendix D

(9) "Airport" means a landing area used regularly by aircraft for receiving or discharging passengers or cargo.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(11) "All-cargo air service" means—

(A) the carriage by aircraft of only (i) property as a common carrier for compensation or hire, or (ii) mail, or both, in commerce between a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same territory or possession of the United States, or the District of Columbia;

(B) the carriage by aircraft of only (i) property as a common carrier for compensation or hire, or (ii) mail, or both, in commerce between a place in any State of the United States or District of Columbia and any place in the Commonwealth of Puerto Rico or the Virgin Islands or between a place in the Commonwealth of Puerto Rico and a place in the Virgin Islands;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

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(12) "Appliances" means instruments, equipment, apparatus, parts, appurtenances, or accessories, of whatever description, which are used, or are capable of being or intended to be used, in the navigation, operation, or control of aircraft in flight (including parachutes and including communication equipment and any other mechanism or mechanisms installed in or attached to aircraft during flight), and which are not a part or parts of aircraft, aircraft engines, or propellers.

(13) "Board" means the Civil Aeronautics Board.

(14) "Charter air carrier" means an air carrier holding a certificate of public convenience and necessity authorizing it to engage in charter air transportation.

(15) "Charter air transportation" means charter trips, including inclusive tour charter trips, in air transportation, rendered pursuant to authority conferred under this Act under regulations prescribed by the Board.

(16) "Citizen of the United States" means (a) an individual who is a citizen of the United States or one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the

board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

(17) "Civil aircraft" means any aircraft other than a public aircraft.

(18) "Civil aircraft of the United States" means any aircraft registered as provided in this Act.

(19) "Conditional sale" means (a) any contract for the sale of an aircraft, aircraft engine, propeller, appliance, or spare part under which possession is delivered to the buyer and the property is to vest in the buyer at a subsequent time, upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (b) any contract for the bailment or leasing of an aircraft, aircraft engine, propeller, appliance, or spare part, by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner thereof upon full compliance with the terms of the contract. The buyer, bailee, or lessee shall be deemed to be the person by whom any such contract is made or given.

(20) "Conveyance" means a bill of sale, contract of conditional sale, mortgage, assignment

of mortgage, or other instrument affecting title to, or interest in, property.

(21) "Federal airway" means a portion of the navigable airspace of the United States designated by the Administrator [Secretary of Transportation] as a Federal airway.

(22) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

(23) "Interstate air commerce," "overseas air commerce," "foreign air commerce," respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other States of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United

States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(24) "Interstate air transportation," "overseas air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other States of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession

of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(25) "Intrastate air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage solely in intrastate air transportation.

(26) "Intrastate air transportation" means the carriage of persons or property as a common carrier for compensation or hire, by turbojet-powered aircraft capable of carrying thirty or more persons, wholly within the same State of the United States.

(27) "Landing area" means any locality, either of land or water, including airports and intermediate landing fields, which is used, or intended to be used, for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo.

(28) "Mail" means United States mail and foreign-transit mail.

(29) "Navigable airspace" means airspace

above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft.

(30) "Navigation of aircraft" or "navigate aircraft" includes the piloting of aircraft.

(31) "Operation of aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this Act.

(32) "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(33) "Propeller" includes all parts, appurtenances, and accessories thereof.

(34) "Possessions of the United States" means (a) the Canal Zone, but nothing herein shall impair or affect the jurisdiction which has heretofore been, or may hereafter be, granted to the President in respect of air navigation in the Canal Zone; and (b) all other possessions of the

United States. Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this Act to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

(35) "Predatory" means any practice which would constitute a violation of the antitrust laws as set forth in the first section of the Clayton Act (15 U.S.C. 12) [15 USCS § 12).

(36) "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.

(37) "Spare parts" means parts, appurtenances, and accessories of aircraft (other than aircraft engines and propellers), of aircraft engines (other than propellers), of propellers and of appliances, maintained for installation or use in an aircraft, aircraft engine, propeller, or appliance, but which at the time are not installed therein or attached thereto.

(38) The term "special aircraft jurisdiction of the United States" includes—

(a) civil aircraft of the United States;

(b) aircraft of the national defense forces of the United States;

(c) any other aircraft within the United States;

(d) any other aircraft outside of the United States—

(i) that has its next scheduled destination or last point of departure in the United States, if that aircraft next actually lands in the United States; or

(ii) having "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, committed aboard, if that aircraft lands in the United States with the alleged offender still aboard; and

(e) other aircraft leased without crew to a lessee who has his principal place of business in the United States, or if none, who has his permanent residence in the United States;

while that aircraft is in flight, which is from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the aircraft and for the persons and property aboard.

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(39) "State agency" means that department, agency, officer, or other entity of a State government which has been designated according to State law as—

(A) the recipient of any notice required under title IV of this Act [49 USCS §§ 1371 et seq.] to be given to a State agency; or

(B) the representative of the State in any matter about which the Board is required, under such title IV, to consult with or consider the views of a State agency.

(40) "Ticket agent" means any person, not an air carrier or a foreign air carrier, and not a bona fide employee of an air carrier or foreign air carrier, who, as principal or agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for, such transportation.

(41) "United States" means the several States, the District of Columbia, and the several Territories and possessions of the United States, including the territorial waters and the overlying airspace thereof.

(Aug. 23, 1958, P. L. 85-726, Title I, § 101, 72 Stat. 737; Sept. 5, 1961, P. L. 87-197, § 3, 75 Stat. 467; July 10, 1962, P. L. 87-528, § 1, 76 Stat. 143;

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Sept. 26, 1968, P. L. 90-514, § 1, 82 Stat. 867; Oct. 14, 1970, P. L. 91-449, § 1, 84 Stat. 921; Aug. 5, 1974, P. L. 93-366, Title I, § 102, Title II, § 206, 88 Stat. 409, Nov. 9, 1977, P. L. 95-163, § 17(b), 91 Stat. 1286; Oct. 24, 1978, P. L. 95-504, § 2, 92 Stat. 1705.)

Federal Aviation Act of 1958, 49 U.S.C. § 1432

§ 1432. Airport operating certificates

(a) Power to issue. The Administrator is empowered to issue airport operating certificates to airports serving air carriers certificated by the Civil Aeronautics Board and to establish minimum safety standards for the operation of such airports.

(b) Issuance; terms and conditions. Any person desiring to operate an airport serving air carriers certificated by the Civil Aeronautics Board may file with the Administrator an application for an airport operating certificate. If the Administrator finds, after investigation, that such person is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this Act and the rules, regulations, and standards prescribed thereunder, he shall issue an airport operating certificate to each person. Each airport operating certificate shall prescribe such terms, conditions, and limitations as are reasonably necessary to assure safety in air transportation. Unless the Administrator determines that it would be contrary to the public

interest, such terms, conditions, and limitations shall include but not be limited to terms, conditions, and limitations relating to the operation and maintenance of adequate safety equipment, including firefighting and rescue equipment capable of rapid access to any portion of the airport used for the landing, takeoff, or surface maneuvering of aircraft.

(c) Exemption from requirements relating to firefighting and rescue equipment. The Administrator may exempt any operator of an air carrier airport enplaning annually less than one-quarter of 1 percent of the total number of passengers enplaned at all air carrier airports from the requirements imposed by subsection (b) of this section relating to firefighting and rescue equipment if he finds that such requirements are, or would be, unreasonably costly, burdensome, or impractical.

(Aug. 23, 1958, P. L. 89-726, Title VI, § 612, as added May 21, 1970, P. L. 91-258, Title I. Part III, § 51(b)(1), 84 Stat. 234; Nov. 27, 1971, P. L. 92-174, § 5(b), 85 Stat. 492; July 12, 1976, P. L. 94-353, Title I, § 19(a), 90 Stat. 883.)

Federal Aviation Act of 1958, 49 U.S.C. Section 1432 Supp.

§ 1432. Airport operating certificates

(a) Power to issue. The Administrator is empowered to issue airport operating certificates to, and establish minimum safety standards for

the operation of, airports that serve any scheduled or unscheduled passenger operation of air carrier aircraft designed for more than 30 passenger seats.

(b) Issuance; terms and conditions. Any person desiring to operate an airport which is described in subsection (a) and which is required by the Administrator by rule, to be certificated may file with the Administrator an application for an airport operating certificate. If the Administrator finds, after investigation, that such person is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this Act and the rules, regulations, and standards prescribed thereunder, he shall issue an airport operating certificate to such person. Each airport operating certificate shall prescribe such terms, conditions, and limitations as are reasonably necessary to assure safety in air transportation. Unless the Administrator determines that it would be contrary to the public interest, such terms, conditions, and limitations shall include but not be limited to terms, conditions, and limitations relating to (1) the operation and maintenance of adequate safety equipment, including firefighting and rescue equipment capable of rapid access to any portion of the airport used for the landing, takeoff, or surface maneuvering of aircraft and (2) such grooving or other friction treatment for primary and secondary runways as the Secretary determines to be necessary.

(c) Exemption from requirements relating to firefighting and rescue equipment. The Administrator may exempt any operator of an airport described in subsection (a)(1) enplaning annually less than one-quarter of 1 percent of the total number of passengers enplaned at all air carrier airports from the requirements imposed by subsection (a)(1) from the requirements imposed by subsection (b) of this section relating to firefighting and rescue equipment if he finds that such requirements are, or would be, unreasonably costly, burdensome, or impractical.

(As amended Sept. 3, 1982, P. L. 97-248, Title V, §§ 524(f), 525(a)-(c), 96 Stat. 697.)

Noise Control Act of 1972, 49 U.S.C. § 1431

§ 1431. Control and abatement of aircraft noise and sonic boom

(a) Definitions. For purposes of this section:

(1) The term "FAA" means Administrator of the Federal Aviation Administration.

(2) The term "EPA" means the Administrator of the Environmental Protection Agency.

(b) Consultations; standards; rules and regulations; aircraft certificates.

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(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title [49 USCS §§ 1421 et seq.]. No exemptionwith respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transporation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

(2) The FAA shall not issue an original type certificate under section 603(a) of this Act [49 USCS § 1423(a)] for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic

boom, consistent with the considerations listed in subsection (d).

(c) Submission of proposed regulations to FAA by EPA; publication; hearing; review of prescribed regulations; report and supplemental report.

(1) Not earlier than the date of submission of the report required by section 7(a) of the Noise Control Act of 1972 [42 USCS § 4906], EPA shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within ninety days after the conclusion of such hearing and after consultation with EPA, the FAA shall —

(A) in accordance with subsection (b), prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification

of the proposed regulations submitted by EPA, or

(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations and a detailed analysis of and response to all documentation or other information submitted by the Environmental Protection Agency with such proposed regulations.

(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1)(A)(ii) or (1)(B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed

pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 [42 USCS § 4332(2)(C)] with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 102(2)(C) [42 USCS § 4332(2)(C)], the report of the FAA indicates that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

(d) Considerations determinative of standards, rules, and regulations. In prescribing and amending standards and regulations under this section, the FAA shall —

(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;

(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transporation in the public interest;

(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

(e) Amendment, modification, suspension, or revocation of certificate; notice and appeal rights. In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 609 [49 USCS § 1429], and in any appeal to the National Transportation Safety Board, the Board

may amend, modify, or reverse the order of the FAA if it finds that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation.

(Aug. 23, 1958, P. L. 89-726, Title VI, § 611, as added July 21, 1968, P. L. 90-411, § 1, 82 Stat. 395; Oct. 27, 1972, P. L. 92-574, § 7(b), 86 Stat. 1239; Nov. 8, 1978, P. L. 95-609, § 3, 92 Stat. 3080.)

Aviation Safety and Noise Abatement Act of 1979, 40 U.S.C. § 2101

§ 2101. Definitions.

For purposes of this subchapter —

(1) the term "airport" means any public-use airport (as defined by section 2202(18) of this title).

(2) the term "airport operator" means, in the case of an airport serving air carriers certificated by the Civil Aeronautics Board, any person holding a valid certificate issued pursuant to section 1432 of this title to operate an airport, and in the case of any other airport, the person operating such airport; and

(3) the term "Secretary" means the Secretary of Transportation.

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Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2201

§ 2201. Declarations of policy

(a) In general

The Congress hereby finds and declares that—

(1) the safe operation of the airport and airway system will continue to be the highest aviation priority;

(2) the continuation of airport and airway improvement programs and more effective management and utilization of the Nation's airport and airway system are required to meet the current and projected growth of aviation and the requirements of interstate commerce, the Postal Service, and the national defense;

(3) this chapter should be administered in a manner to provide adequate navigation aids and airport facilities, including reliever airports and reliever heliports, for points where scheduled commercial air service is provided;

(4) this chapter should be administered in a manner consistent with a comprehensive airspace system plan to minimize the use of safety facilities, with highest priority for commercial service airports, including but not limited to, the goal of installing, operating, and maintaining, to the extent

possible under available funds and given other safety needs, a precision approach system, a vertical visual guidance system, and a full approach light system for each primary runway, grooving, or friction treatment of all primary and secondary runways, a nonprecision instrument approach for all secondary runways, runway end identifier lights on all runways that do not have an approach light system, electronic or visual vertical guidance on all runways, distance-to-go signs for each primary and secondary runway, a surface movement radar system at each category III airport, a taxiway lighting and sign system, runway edge lighting and marking, and radar approach coverage for all airport terminal areas;

(5) all airport and airway programs should be administered in a manner consistent with the provisions of sections 1302 and 1303 of this title, with due regard for the goals expressed therein of fostering competition, preventing unfair methods of competition in air transportation, maintaining essential air transportation, and preventing unjust and discriminatory practices;

(6) reliever airports make an important contribution to the efficient operation of the airport and airway system, and special emphasis should be given to their development;

(7) cargo hub airports play a critical role in the movement of commerce through the airport and airway system and appropriate provisions

should be made to facilitate the development and enhancement of such airports;

(8) aviation facilities should be constructed and operated with due regard to minimizing current and projected noise impacts on nearby communities;

(9) the Federal administrative requirements placed upon airport sponsors can be reduced and simplified through the use of a single project application to cover all airport improvement projects contained in the airport's annual expenditure program;

(10) it is in the national interest to develop in metropolitan areas an integrated system of airports designed to provide expeditious access and maximum safety;

(11) airport construction and improvement projects which increase the capacity of facilities to accommodate passenger and cargo traffic, thereby increasing safety and efficiency and reducing delays, should be undertaken to the maximum feasible extent;

(12) it is in the national interest to ensure that nonaviation usage of navigable airspace be accommodated but not allowed to decrease the safety and capacity of the airspace and airport system; and

(13) artificial restrictions on airport capacity are not in the public interest and should not be imposed to alleviate air traffic delays unless other reasonably available and less burdensome alternatives have first been attempted.

(b) Transportation planning

It is declared to be in the national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective, the Secretary shall cooperate with State and local officials in the development of airport plans and programs which are formulated on the basis of overall transportation needs and coordinated with other transportation planning with due consideration to comprehensive long-range land-use and access plans and overall social, economic, environmental, system performance, and energy conservation goals and objectives. The process shall be continuing, cooperative, and comprehensive to the degree appropriate based on the complexity of the transportation problems.

§ 2202. Definitions

(a) In general

As used in this chapter—

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(1) "Airport" (A) means any area of land or water which is used, or intended for use, for the landing and takeoff of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon; and (B) includes any heliport.

(2) "Airport development" means any of the following activities, if undertaken by the sponsor, owner or operator of a public-use airport:

(A) any work involved in constructing, reconstructing, repairing, or improving a public-use airport or portion thereof, including—

(i) the removal, lowering, relocation, and marking and lighting of airport hazzards; and

(ii) the preparation of plans and specifications, including field investigations incidental thereto;

(B) any acquisitions or installation at or by a public-use airport of—

(i) navigation and other aids (including, but not limited to, precision approach systems) used by aircraft for landing at or taking off from such airport, including any necessary site preparation thereby required;

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(ii) safety or security equipment required by the Secretary by rule or regulation for the safety or security of persons and property at such airport, or specifically approved by the Secretary as contributing significantly to the safety or security of persons and property at such airport;

(iii) snow removal equipment;

(iv) aviation-related weather reporting equipment;

(v) equipment to measure runway surface friction; or

(vi) fire fighting and rescue equipment at any airport which serves scheduled passenger operations of air carrier airport designed for more than 20 passenger seats; and

(C) any acquisition of land or of any interest therein, or of any easement through or other interest in airspace, including land for future airport development, which is necessary to permit any airport development described in subparagraph (A) or (B) of this paragraph or to remove, mitigate, prevent, or limit the establishment of airport hazards.

(3) "Airport hazard" means any structure or object of natural growth located on or in the vicinity of a public-use airport, or any use of land near such an airport, which obstructs the airspace

required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft.

(4) "Airport planning" means planning as defined by such regulations as the Secretary shall prescribe, and includes integrated airport system planning.

(5) "Commercial service airport" means a public airport which is determined by the Secretary to enplane annually 2,500 or more passengers and received scheduled passenger service of aircraft.

* * *

(10) "Passengers enplaned" means domestic, territorial, and international revenue passenger enplanements in the States in scheduled and nonscheduled service of aircraft in intrastate, interstate, and foreign commerce as shall be determined by the Secretary pursuant to such regulations as the Secretary may prescribe and includes passengers on board international flights which transit an airport located in the 48 contiguous States for nontraffic purposes.

* * *

(12) "Primary airport" means a commercial service airport which is determined by the Secretary to have more than 10,000 passengers enplaned annually.

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* * *

(17) "Public airport" means any airport which is used or to be used for public purposes, under the control of a public agency, the landing area of which is publicly owned.

(18) "Public-use airport" means—

(A) any public airport,

(B) any privately owned reliever aircraft, and

(C) any privately owned airport designated by the Secretary as having the function of relieving congestion at a commercial service airport and providing more general aviation access to the overall community.

* * *